

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 296
3002934

BETWEEN **TEOFILO VAILUA**
Applicant

AND **HUBBARD FOODS**
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Simativa Perese, Counsel for Applicant
Erin Burke, Counsel for Respondent

Submissions received: 8 and 15 September 2016 from Applicant
13 September 2016 from Respondent

Determination: 27 September 2017

**COSTS DETERMINATION
OF THE EMPLOYMENT RELATIONS AUTHORITY**

**A. The Respondent is ordered to pay to the Applicant a total of \$16,992.37
made up of:**

- i) The sum of \$15,000.00 towards the Applicant's legal costs;**
- ii) The sum of \$766.65 for hearing fees; and**
- iii) The sum of \$71.56 for the filing fee the Applicant paid to lodge his
Statement of Problem; and**
- iv) The sum of \$1,154.16 for printing and binding**

**B. Payment of the sum of \$16,992.37 is to be paid within 14 days of the date
of this determination.**

Employment Relationship Problem

[1] On 1 September 2017, I issued a determination in which I found Mr Vailua had suffered an unjustified disadvantage to his employment by Hubbard Foods Limited's failure to provide him with a safe workplace. I also found he had been unjustifiably dismissed. Hubbards was ordered to pay Mr Vailua for lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Mr Vailua had seven days to file a costs memorandum. Hubbards then had a further seven days to file its costs memorandum.

[3] By memorandum of counsel for Mr Vailua dated 8 September 2017, I was advised the parties had been unable to resolve costs. Mr Vailua accordingly applied for costs. His application was opposed by Hubbards through a memorandum of counsel dated 13 September 2017. Mr Vailua responded to this memorandum on 15 September 2017.

Application for costs

[4] Mr Vailua claims an award of costs representing double the daily tariff generally awarded by the Authority. Alternatively, he submits the Authority should add two days, at the daily tariff rate of \$3,500.00, to the hearing time to cover the preparation of written closing submissions and the site visit on 6 July 2017. In addition he claims the Authority's filing fee of \$71.56, the hearing fees of \$766.65, and expenses of \$1,082.60 for printing and binding the common bundles.

Authority's Approach to Costs

[5] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks reasonable.¹ The principles applying to costs are well settled and do not require repeating.²

[6] Some of the principles highlighted by Hubbards are that costs are discretionary and that discretion should be exercised in accordance with principle. Costs normally

¹ Employment Relations Act 2000, Schedule 2 clause 14.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

follow the event but in some cases should lie where they fall. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[7] Recently in *Booth v Big Kahuna Holdings Limited*³ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[8] An assessment of costs will normally start with the notional daily tariff. For matters filed in the Authority from 1 August 2016, the Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff is \$3,500.00⁴. The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

Should the daily tariff be adjusted?

[9] The investigation meeting took place over 3.5 days. In addition, a site visit was necessary. The starting point for calculation of the daily tariff is 4 days. Using the normal daily tariff this equals a sum of \$15,000.00.

[10] There are several reasons advanced by Mr Vailua in support of his application to uplift the daily tariff. Hubbards also advanced numerous reasons why the daily tariff should be reduced. Having considered both parties' submissions, I am satisfied that neither an uplift, nor a reduction, in the daily tariff is reasonable.

[11] I do not accept the hearing time was unreasonably lengthened by the positions taken by either party. Some additional time was taken to address Mr Vailua's claim that he had been made redundant. However similar additional time was taken by Hubbards in its attempt to discredit Mr Vailua and Ms Vailua's evidence and to convince the Authority that Mr Vailua's injury was not work-related.

³ [2015] NZEmpC

⁴ Practice Note 2, Costs in the Employment Relations Authority

[12] Both parties spent an equal time cross-examining witnesses. Ms Burke's submission that Hubbards was provided with little time to cross-examine is neither supported by my recollection nor the records I kept. Ms Burke cross-examined Mr Vailua's witnesses, the ACC summoned witness, and re-examined her own witnesses, extensively.

[13] The filing of memoranda by the parties prior to the investigation meeting added to both parties' legal costs. Mr Vailua's costs in preparing these memoranda could, in large part, have been avoided had the information contained therein been included in the Statement of Problem. Hubbards' costs could also have, in large part, been avoided had it reviewed the minutes issued by the Authority. Both parties could have avoided filing memoranda, and responses, had they attempted to resolve matters between themselves in the first instance.

[14] I do not accept in the present circumstances that a reduction in the daily tariff is warranted due to an interpreter being required. An interpreter was necessary when Mr Vailua gave evidence. This was discussed during the first telephone conference, confirmed in the first minute of the Authority and was subsequently requested by Hubbards in a memorandum filed on its behalf with the Authority.

[15] The site visit was requested by both parties. It was organised by the parties so that I could view the machines in operation. This was a helpful visit which was necessary and assisted my investigation.

Other expenses claimed

[16] In my minute of 17 May 2017 I directed Mr Vailua to prepare a Common Bundle of Documents. Two copies of this bundle were to be filed with the Authority. In addition, Mr Vailua prepared a copy for himself and a copy for Hubbards. Mr Vailua claims the cost of preparation of the bundles.

[17] The four bundles each comprised 1221 pages. Mr Vailua has produced an invoice showing he was charged a sum of \$1,154.16 for the printing and binding. Taking into account GST, the sum charged for each page is 19c. I find this cost is reasonable and is payable by Hubbards.

[18] The Authority has also charged Mr Vailua \$766.65 in hearing fees and the filing fee of \$71.66. These are costs that Hubbards must also pay to Mr Vailua.

Determination

[19] Hubbards is ordered to pay to Mr Vailua the sum of \$15,000.00 towards Mr Vailua's legal costs. In addition, it is ordered to pay Mr Tuala a sum of \$766.65 for hearing fees, the sum of \$71.56 being the Authority's filing fee, and the sum of \$1,154.16 for printing and binding. These sums must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority